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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

COLUMBUS, GEORGIA,
PETITIONER,

VERSUS

PETER L. KNIGHT; DENNIS L. WALL; MICHAEL D. MULKEY; JACK D. KINSMAN; JOHN HAYGOOD; HENRY HALL; JAMES BULLOCK; WILLIAM L. McCARTY; FRANK PETTY; and JIMMY L. HART, ET AL.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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August 8, 1994

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QUESTIONS PRESENTED FOR REVIEW

1.

Should Fair Labor Standards Act class action claims by members of a city-county fire department accrue at the date of the enactment of an ordinance alleged to be the only source of the alleged FLSA violations by the government when plaintiffs by their own pleadings had full knowledge of the governmental action, when no other subsequent act of discrimination is alleged and the complete official action is embodied in the ordinance, and when the ordinance in question is without dispute facially nondiscriminatory in that it treats similarly situated employees alike and is nondiscriminatorily applied? Yes!

2.

Should fire department officers in the Eleventh Circuit who claim discrimination under the Fair Labor Standards Act by being classified as exempt from its provisions be governed by the same statute of limitations that governs exempted fire department officers in the Fifth Circuit where the cause of action accrues on the date of the classification, and should FLSA overtime claims by fire department employees in the Eleventh Circuit be barred in the same manner as fire department overtime claims are barred in the Sixth Circuit where the statute commences to run from the date of the calculation that denies overtime? Yes!

3.

Should claims of continuing violations for denial of overtime by battalion chiefs, fire captains, and fire lieutenants filed on October 1, 1990 after being classified on July 1, 1987 by the City of Columbus as exempt from the Fair Labor Standards Act

be barred by the FLSA statute of limitations in the same manner as the claims of nonexempt firefighters for being denied a wage increase are barred in the same action that alleges FLSA discrimination against all plaintiffs as a result of the same act of classification by the City on July 1, 1987 — in response to *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)? Yes!

4.

Should Rule 4(j) of the Federal Rules of Civil Procedure be enforced in the Eleventh Circuit in the same manner as it has been enforced in the Second, Third, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits as contemplated by *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987) — so as to require Plaintiffs in the case at bar to serve Defendant within 120 days of filing their Complaint when said Plaintiffs show no good cause for waiting from October 1, 1990 until March 15, 1991 before perfecting proper service upon the Mayor of Columbus? Yes!

5.

Should Rule 37(d) of the Federal Rules of Civil Procedure be enforced in the Eleventh Circuit in the same manner as it has been enforced in the Third, Fourth, Seventh, Eighth, Ninth, and Federal Circuits — as contemplated by *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) — so as to impose sanctions dismissing the action when Plaintiffs, without showing any excusable neglect, and, deliberately, ignore and refuse to answer Defendant's interrogatories and requests for production of documents until after Defendant files a Rule 37(d) Motion to Dismiss, all of which is more than one year after the filing of Defendant's discovery requests during which period Defendant's attorney writes two letters to Plaintiffs' attorney concerning the discovery, both of which are ignored? Yes!

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Besides the Defendant-Appellee-Petitioner Consolidated Government of Columbus and Muscogee County, Georgia, created by the laws of the State of Georgia with the official corporate name of "Columbus, Georgia" and commonly known as "the City," the Plaintiffs-Appellants-Respondents are various members of the Columbus Fire Department whose names are footnoted below as they were recorded in the attachment to their Notice of Appeal which took their case from the District Court to the Court of Appeals. Neither the City Attorney nor the Assistant City Attorney (Clifton C. Fay who is not a participant in this case but who is, like the City Attorney, employed by the City) has any financial interest in the outcome of this case. Attorneys for the Respondents are identified in the Certificate of Service, and the judges below are identified in the decisions attached in the appendix.

Footnote List of Plaintiffs:

1. Warner F. Fussell
2. Ronald E. Hawkins
3. William T. Monk
4. Harrold D. Alford
5. Thomas H. Benefield
6. Chester L. Bowers
7. William T. Burnette, III
8. William R. Collins
9. Edward E. Cotton
10. Bobby R. Cox
11. Larry G. Davenport
12. Douglas J. Dennis
13. Thomas E. Hagler
14. James E. Hudson
15. Henry W. Hutcherson
16. Lester R. Massey
17. William L. McCarty
18. David R. Pate
19. Virgil Frank Petty
20. J. R. Pilkinton
21. Royce Powell
22. Jerry L. Renfroe
23. Carroll D. Smith
24. Rodger C. Vardman
25. Roland L. Waters
26. G. M. Johnston
27. Carlton E. Alford
28. Jerry L. Alford
29. Gene Austin
30. Jimmy R. Barker
31. John H. Blizzard, Jr.
32. Van D. Borum
33. James S. Bullock
34. R. S. Chambliss
35. John Z. Collins
36. Luther Lamar Cope

footnote continued

37. Alan G. Davis
38. Jerry W. Deal
39. Jimmy D. BeBice
40. Thomas J. Drake
41. Walter E. Edenfield
42. Rex Enfinger
43. Jerry M. Fountain
44. Ronnie E. Fowler
45. Billy S. Freeman
46. Gary W. Goodman
47. Henry E. Hall
48. James M. Hall
49. Donald R. Johnson
50. David L. Jones
51. Curtis W. McEldery
52. William G. Mears
53. Ronald E. Parker
54. Samuel W. Poole
55. Gerald L. Price
56. Charles D. Reid
57. Victor F. Schmidt
58. Bobby J. Southerland
59. Thomas A. Standridge
60. Robert M. Stone
61. Byron D. Taylor
62. Paul D. Thrower
63. Jesse T. Toole, Jr.
64. Jerry C. Wadkins
65. Dorsey F. Welch
66. Larry E. White
67. J. D. Wilson
68. Larry Alford
69. William T. Berry
70. Jerry W. Brown
71. K. R. Brown
72. Ronnie R. Brown
73. Richard L. Coe
74. Julius W. Cooper
75. A. M. Copeland
76. Robert E. Dorriety
77. Bobby A. Dutton
78. Eugene Edge
79. Willie D. Farley
80. Ricky L. Fisher
81. Rickey Griggs
82. John R. Hammock, Jr.
83. Rickey Harrow
84. John H. Haygood
85. Hubert F. Helms
86. Billy F. Herring
87. Manfred Hutson
88. Alvin T. Jones
89. Charlie C. Kegler
90. Jack D. Kinsman
91. Peter L. Knight
92. James G. Lang
93. Hugh J. Ligon
94. Billy W. Logan
95. Robert C. Loughman
96. Ansel D. Mains
97. James O. Manning
98. Harald W. McDaniel
99. Robert McMillan
100. Jeffrey A. Meyer
101. Michael L. Milam
102. Michael W. Nolin
103. Steve M. Powell
104. Davis A. Rogers
105. John M. Russell
106. Richard L. Simmons
107. Timothy A. Smith
108. Henry D. Standridge
109. T. J. Stansell
110. David Starling
111. Lester D. Talley
112. Andrew Thomas
113. Bruce E. Thompson
114. Richard O. Valentini
115. David K. Watson
116. Jimmy L. Watson
117. James F. Whatley
118. John P. White, Jr.

footnote continued

119. Walter C. Whittlesey
120. William H. Widgeon, Jr.
121. Steve L. Willetts
122. Donald B. Williams
123. John B. Williams
124. Russell Woomer
125. Gary Adkins
126. William S. Adkins
127. Jerry Anderson, Jr.
128. Ulysses Bailey
129. Janice Barron
130. Michael G. Bell
131. Mike Billingsley
132. Albert G. Blair, Jr.
133. Scott Boatner
134. Robert B. Brittain
135. Gary S. Brown
136. James R. Bryant
137. Ricky T. Burleson
138. Mark A. Burnett
139. Sonny O. Chambers, Jr.
140. Kevin T. Cantrell
141. Victor A. Church
142. Marilyn S. Clemmons
143. Douglas J. Collins
144. Jerry Connally
145. Ferdinard Crawford
146. Anthony M. Davis
147. Ramon R. Davis
148. Gary C. Deal
149. Robert J. Dempsey
150. Randy Downs
151. David R. Dumas
152. Billy W. Dunn
153. Gary W. Elkins
154. Bobby R. Ellerbee
155. Willie L. Elliott
156. Arnold Farley
157. Wilson Farley
158. Charles L. Ferrell
159. Dennis L. Folmar
160. Rodney D. Fuller
161. Darrell W. Gallops
162. C. E. Geer
163. Vincent D. Green
164. Oscar Gregory, Jr.
165. Wiley E. Grimes
166. Michael F. Hamer
167. Mike Hammock
168. Henry A. Harris
169. Benjamin Harrow
170. D. R. Herring
171. Terry L. Herring
172. Steven W. Hill
173. Keith D. Holden
174. Eugene Hull
175. Caridy Jackson
176. Michelle Jackson
177. James Johnson, Jr.
178. Roger Johnson
179. Connie J. Jones
180. Donald S. Jones
181. Douglas H. Jones
182. Jesse Jones, Jr.
183. Ronnie Jones
184. William L. Kay
185. Alan Kirland
186. Thomas W. Lang
187. Jay W. Leatherland
188. Walder L. Leford, Jr.
189. Davis Marshall
190. Michael S. McCain
191. Mike McCoy
192. Randy A. McFarlin
193. Charles R. McGee
194. Luther C. Miller, Jr.
195. Michael R. Miller
196. Wayne Miller
197. Anthony T. Monk
198. Michael L. Morris
199. Michael D. Mulkey
200. Brice D. Murrell

footnote continued

201. David K. Nixon
202. Michael W. Overby
203. Anthony J. Parciasepe
204. Adam Parkman, Jr.
205. Larry T. Passmore
206. Bennie Peterson
207. Bobby Phillips
208. John T. Phillips
209. Keven B. Phillips
210. Randall C. Phillips
211. Rodney Pitts
212. Phillip R. Poole
213. Henry Porter
214. Timothy E. Price
215. Larry D. Qualls, Jr.
216. David M. Ray
217. Chris W. Rebidue
218. Ronald Q. Reeves
219. Ronald Renfroe
220. F. R. Richardson
221. Ronnie D. Robinson
222. Brian K. Russell
223. Michael D. Russell
224. George G. Simpson, Jr.
225. Byrl T. Slaughter
226. Charles A. Smith
227. Gordon G. Smith
228. Hubert Smith, Jr.
229. Jimmy M. Smith
230. Norman Smith
231. Ronnie Smith
232. Tommy Smith
233. Lee R. Spencer
234. Stephen P. Starley
235. Frederick R. Street
236. Thomas W. Streeter
237. James S. Strickland
238. Michael R. Szot
239. Alonzo Taylor
240. Charles L. Thomas
241. Danny R. Thompson, Sr.
242. Timothy R. Treadwell
243. Mark D. Tryon
244. Todd A. Turner
245. Willie L. Vaughn, Jr.
246. Stanley Veasley
247. Ricky L. Wadkins
248. Dennis L. Wall
249. Mike Watford
250. Doris E. Weaver
251. Rickey Weeks
252. Charles E. Wells
253. Clifton N. Wherry
254. Hayward O. Whitaker
255. William T. Wilks
256. Jerry Williams
257. Earnest Willis
258. Evelyn F. York
259. Ernest Roberson
260. Carol P. Roberts
261. Jimmy L. Hart
262. Mark A. Thompson
263. Joseph L. Thornton
264. Charles L. Todd

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS OR ADMINISTRATIVE AGENCIES

The decision of the Eleventh Circuit Court of Appeals from which Petitioner seeks review is reprinted in the appendix and is reported at 19 F.3d 579. The decision of the U.S. District Court for the Middle District of Georgia which produced the appeal to the Eleventh Circuit is also reprinted in the appendix but is not reported. No administrative agency decision is involved in this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The United States Court of Appeals for the Eleventh Circuit rendered an opinion on April 22, 1994, reversing in part a decision of the United States District Court for the Middle District of Georgia, and Petitioner moved for rehearing and suggested rehearing en banc on said partial reversal on May 9, 1994. Petition for Rehearing was denied on June 14, 1994, and this Petition for a Writ of Certiorari seeks review of these

Eleventh Circuit decisions reversing the Middle District of Georgia in part. No extension of time within which to file the Petition for a Writ of Certiorari has been sought, but a stay of the Eleventh Circuit's mandate was sought and has been granted up to and including August 15, 1994. The statutory provision believed to confer jurisdiction upon the Supreme Court to review the judgment or decree of the Court of Appeals by writ of certiorari is 28 U.S.C. § 1254 (1) (102 Stat. 202).

The Court of Appeals has rendered a decision in conflict with the decisions of several other courts of appeals, has departed from the accepted and usual course of judicial proceedings so as to require supervision by the Supreme Court, and has decided federal questions conflicting with applicable decisions of the Supreme Court. As to the first three questions presented for review concerning the FLSA statute of limitations and the conclusion that the City of Columbus engaged in a continuing FLSA violation after its July 1, 1987 exemption of fire department officers from the FLSA, the Eleventh Circuit conflicts directly with *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) and *Anderson v. City of Bristol*, 6 F.3d 1168 (6th Cir. 1993) and fails to follow the policy and rationale expressed in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). In failing to require Plaintiffs to comply with Rule 4(j) of the FRCP, the Eleventh Circuit not only refused to follow its own precedent in *In re Cooper*, 971 F.2d 640 (11th Cir. 1992), *Prisco v. Frank*, 929 F.2d 603 (11th Cir. 1991) and *Schnabel v. Wells*, 922 F.2d 726 (11th Cir. 1991) but also rendered a decision contrary to *Frasca v. United States*, 921 F.2d 450 (2nd Cir. 1990), *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81 (3rd Cir. 1987), *Traina v. United States*, 911 F.2d 1155 (5th Cir. 1990), *Friedman v. Estate of Presser*, 929 F.2d 1151 (6th Cir. 1991), *Tso v. Delaney*,

969 F.2d 373 (7th Cir. 1992), *Hamilton v. Endell*, 981 F.2d 1062 (9th Cir. 1992), *Cox v. Sandia Corporation*, 941 F.2d 1124 (10th Cir. 1991), and *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987). In ruling that the sanction of dismissal under Rule 37(d) of the FRCP was not warranted, the Eleventh Circuit not only refused to follow binding precedent in *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970) but also rendered a decision contrary to *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32 (3rd Cir. 1979), *United States for the use of Weston & Brooker Company v. Continental Casualty Company*, 303 F.2d 91 (4th Cir. 1962), *Charter House Insurance Brokers, Ltd. v. New Hampshire Insurance Company v. United States*, 667 F.2d 600 (7th Cir. 1981), *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975), *Sigliano v. Mendoza*, 642 F.2d 309 (9th Cir. 1981), *Minnesota Mining & Manufacturing Company v. Eco Chem, Inc.*, 757 F.2d 1256 (Fed. Cir. 1985) and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

STATUTES AND RULES INVOLVED IN THE CASE

1. 29 U.S.C.A. § 207 (a)(1) (52 Stat. 1063):

"Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

2. Section 8 of the Fair Labor Standards Act Amendments of 1985

(Pub. L. No. 99-150, § 8, 99 Stat. 787, 791):

> "A public agency which is a State, political subdivision of a State, or an interstate governmental agency and which discriminates or has discriminated against an employee with respect to the employee's wages or other terms or conditions of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the Fair Labor Standards Act of 1938 [section 207 of this title] shall be held to have violated section 15(a)(3) of such Act [subsec. (a)(3) of this section]. The protection against discrimination afforded by the preceding sentence shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of such Act [subsec. (a)(3) of this title]."

3. 29 U.S.C.A. § 255(a) (61 Stat. 87):

> "Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.] —
>
> > (a) if the cause of action accrues on or after May 14, 1947 may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;"

4. Rule 4(j) of the Federal Rules of Civil Procedure:

> "If a service of summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule."

5. Rule 37(d) of the Federal Rules of Civil Procedure:

> "If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstance make an award of expenses unjust.

> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)."

STATEMENT OF THE CASE

The United States Court for the Middle District of Georgia granted the City's Motion for Summary Judgment and dismissed the firefighters' and fire officers' Fair Labor Standards Act action (brought under 29 U.S.C.A. § 201 et seq. with jurisdiction bestowed upon the District Court by 28 U.S.C.A. § 1331) for the stated reason that it was filed more than three years after the cause of action had arisen. Plaintiffs appealed and Defendant cross-appealed in order to ensure that the issues made by separate motions in the District Court under Rule 4(j) and Rule 37(d) also be considered. The panel decision discussed the statute of limitations issue throughout its opinion but dismissed without definitive comment in Footnote 3 the Rule 4(j) and Rule 37(d) issues.

The District Court was affirmed in part and reversed in part: the claims by the officers that they were improperly exempted by the City from the Fair Labor Standards Act were remanded to the District Court, while the claims of the nonofficers that alleged improper denial of a pay raise by the City in violation of the Fair Labor Standards Act were timed-barred. Both claims arose out of the classification of Columbus Fire Department employees by the Columbus Council on July 1, 1987; the Complaint was filed on October 1, 1990 and was not served until March 15, 1991.

The panel opinion distinguished *Anderson v. City of Bristol*, 6 F.3d 1168 (6th Cir. 1993) and *Alldread v. City of Grenada*,

988 F.2d 1425 (5th Cir. 1993), which, according to the panel, appeared "at first blush to be contrary to the decision we reach." The first three questions in this Certiorari Petition submit that the two decisions are not distinguishable from the case at bar and that the Eleventh Circuit, in departing from them, has now charted a course contrary to these other circuits and contrary to precedent in the Supreme Court. The last two questions present important issues involving the integrity of the Federal Rules of Civil Procedure in which the Eleventh Circuit is contrary to its own precedents and to other circuits and to the Supreme Court.

The facts necessary for argument of the statute of limitations issue are either contained in the panel decision or have been heretofore recited. Since the panel opinion relegates the Rule 4(j) and Rule 37(d) issues to a footnote, some further factual elaboration is necessary for seeking review of these two important procedural points.

Plaintiffs filed their Complaint on October 1, 1990. (R1-1) The City moved to dismiss the unserved Complaint on February 13, 1991. (R1-3) Plaintiffs claimed to have served the Mayor of Columbus via a party plaintiff on January 4, 1991. (R1-5) The City responded by saying that Federal Rule of Civil Procedure 4(c)(2) does not permit this. (R1-6) After the filing of the City's Rule 4(j) Motion to Dismiss, Plaintiffs purported to serve on March 4, 1991 one Debbie Herring in the Mayor's Office; however, she had no recollection of the transaction. (R1-7, 9) Plaintiffs served Mayor Frank Martin on March 15, 1991. (R2-10, Exhibit I) The City renewed its Motion to Dismiss under Rule 4(j) and expanded it to invoke Rule 12, "particularly on the grounds that the District Court lacks jurisdiction over the person of Defendant because of insufficiency of service of process." (R2-11) The District Court denied the Motion to Dismiss on the grounds that "if, in fact,

service was not perfected within 120 days the Plaintiffs have nevertheless shown good cause why the technical requirements were not satisfied" and that "Defendants had ample notice of this lawsuit well within the period and have not been prejudiced by any lack of service within the 120 day period." (R2-14) The City is not aware of what the District Court had in mind to support its conclusions, nor does the record show any fact to support the "good cause" requirement of Rule 4(j) that is necessary to prevent mandatory dismissal.

Defendant filed a Request for Production of Documents on Plaintiffs on December 3, 1991 (R3-33) and Interrogatories on December 4, 1991 (R3-34). These discovery requests were short and were addressed to the essential elements of Plaintiffs' allegations. Defendant moved under Rule 37(d) for dismissal of the action on February 16, 1993 for refusal of Plaintiffs to respond in any manner whatsoever to these discovery requests (R3-53), and Defendant called to the attention of the District Court letters of March 19, 1992 and October 30, 1992 from the City Attorney to Plaintiffs' attorney calling to his attention the adverse effect of the unanswered discovery upon any progress or resolution of the case (R3-54). Plaintiffs filed responses and objections to Defendant's requests on February 18, 1993, and these purported answers offered no evidence but rather serve to prove that Plaintiffs' refusal to respond to discovery is wilful in nature. (R3-56, 57)

ARGUMENT AND AUTHORITIES

1. STATUTE OF LIMITATIONS

Following the reasoning of an earlier decision of *Hendrix v. Yazoo City*, 911 F.2d 1102 (5th Cir. 1990), *Alldread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) applies the FLSA statute of limitations so as ***not*** to find a continuing violation in a suit involving ***both*** a "refusal to pay fire fighters for sleep

time, and challenging classification of fire captains as salaried employees." The Eleventh Circuit's fixation on the sleep time aspect of the Fifth Circuit case ignores the foregoing quote from the synopsis of the decision as well as these significant statements in the *Alldread* opinion:

1. "They additionally demanded overtime compensation for all fire personnel holding the rank of fire captain, contending that the City had wrongly classified fire captains as salaried employees under 29 C.F.R. § 541.1 to avoid Fair Labor Standards Act overtime provisions." 988 F.2d 1425, 1427, 1428

2. "The court further granted summary judgment for the City on appellants' claim relating to the status of captains as exempt salaried employees." 988 F.2d 1425, 1428

3. "The new plan also designated fire captains as executive employees and changed them from hourly to salaried status." 988 F.2d 1425, 1429

4. "And those individuals who held the position of fire captain charged that they were not, in fact, executive employees but rather had been pretextually classified as such by the City to avoid Fair Labor Standards Act's overtime requirements." 988 F.2d 1425, 1429

5. "The court likewise concluded that as to those employees who held the position of fire captain at the time the new pay plan was implemented, their claims that they were not properly classified and treated as exempt employees were time barred. This court agrees, and finds that the district court properly rejected appellants' bid to avert application of the limitations bar on the basis of a continuing violation theory." 988 F.2d 1425, 1430

What is more, the Eleventh Circuit really does not answer the common sense question of why there should be a legal

distinction for statute of limitations purposes between the act of a municipality in refusing to pay for sleep time and in classifying officers as exempt from the FLSA.

Also following *Hendrix v. Yazoo City, Anderson v. City of Bristol,* 6 F.3rd 1168 (6th Cir. 1993) concludes that claims for violations of both Section 7 and Section 8 of the Fair Labor Standards Act are time-barred when the government's act occurred outside of the statute of limitations period and that the continuing effects of the original act reflected in the issuance of paychecks do not create continuing violations. Employees of the Bristol Fire Department, like the present officers of the Columbus Fire Department, alleged both discrimination under FLSA Section 8 and denial of overtime under FLSA Section 7. The cause of action out of which the City of Bristol case arose consisted of the City's recalculation of wage rates, and both discrimination and overtime claims were time-barred: "We find that even if the City had violated section 7 or section 8 of the FLSA, these claims are time-barred." 6 F.3rd 1168, 1174. Although the Eleventh Circuit agrees with the Sixth Circuit concerning the statute of limitations bar for the Section 8 violation, there arises a conflict in the circuits because the Eleventh Circuit reaches a contrary conclusion from the following holding of the Sixth Circuit for the Section 7 claim:

> "Neither is there any 'continuing violation' of section 7. Even if the recalculation of wage rates were held to be a violation of the overtime provisions of section 7, that violation occurred in July 1985. The only continuing effect is a reduced pay rate that absorbed any overtime increase that would have occurred without the wage reduction. Therefore, we find that there was no continuing violation of the FLSA, and that the section 7 and section 8 claims alleged in Count I are time-barred." 6 F.3rd 1168, 1176

In arriving at the opposite conclusion in the case at bar, the Eleventh Circuit — contrary to logic and law — perceives some difference in the simple act of calculation of wages by the City of Bristol and the simple act of classification of employees by the City of Columbus so that the absence of overtime in a Bristol paycheck does not constitute a continuing violation while the absence of overtime in a Columbus paycheck does.

Dunn v. Cobb County, 760 F. Supp. 909 (N. D. Ga. 1991), affirmed by the Eleventh Circuit on November 25, 1992 in Case No. 91-9086, followed *Hendrix v. Yazoo City*. The present opinion of the Court of Appeals cites and follows its prior unpublished affirmance of the Northern District of Georgia, as well as *Hendrix, Alldread*, and *Anderson*, in holding that the claims of the Columbus nonofficer firefighters are time-barred. The City of Columbus now borrows from the Northern District's analysis of three Supreme Court decisions with the suggestion that the Court of Appeals should have applied this reasoning of the Supreme Court to the Columbus fire officers:

> "The Supreme Court's most recent word on the continuing violation doctrine came in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989). *Lorance* concerned a seniority policy which allegedly violated portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The policy had been adopted long outside the statute of limitation for Title VII actions set forth in 42 U.S.C. § 2000e5(e). Plaintiffs, however, argued that the statute of limitations should not have begun to run until Plaintiffs felt the effects of the seniority system which occurred much later when they were laid off during an economic slump. *Lorance*, 490 U.S. at 902-03, 109 S.Ct. at 2264, 104 L.Ed.2d at 969.

The Court declined to view the lay-offs as a continuing or distinct violation, relying on *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). In *Ricks* the Court rejected the characterization of an employment discharge pursuant to an earlier discriminatory denial of tenure as a continuation of the earlier violation. *Evans* involved a flight attendant who had been discharged outside the limitations period for allegedly discriminatory reasons. She was later rehired. Pursuant to a facially neutral seniority system, however, she was denied seniority for her earlier service. The Court agreed with the plaintiff that the seniority system gave 'present effect to a past act of discrimination,' but nonetheless found no continuing violation, stating:

> a challenge to a neutral system may not be predicated on the mere fact that a past event which has no present legal significance has affected the calculation of seniority credit, even if the past event might at one time have justified a valid claim against the employer.

431 U.S. at 560, 97 S.Ct. at 1890, *quoted in Lorance*, 490 U.S. at 908, 109 S.Ct. at 2267, 104 L.Ed.2d at 972.

Applying *Ricks* and *Evans* to the facially neutral seniority system before it in *Lorance*, the Court determined that the layoffs were not continuing violations. Rather, the Court found them to be 'wholly dependent on discriminatory conduct [the adoption of the seniority system] occurring well outside the period of limitations. ...' *Lorance*,

490 U.S. at 908, 109 S.Ct. at 2267, 104 L.Ed.2d at 972. Plaintiffs justified their delay in challenging the discriminatory conduct by stressing the speculative nature of the harm at the time of the seniority system's adoption. The Court, however found the reduction in contract rights to be a concrete harm. The Court reasoned that the plaintiffs' rights under the contract had perceptibly been diminished, which, like the denial of tenure in *Ricks*, had put the plaintiffs on notice that they had suffered a harm albeit one which would reach its "most painful" point later. *Lorance*, 490 U.S. at 907, n. 3, 109 S.Ct. at 2266, n. 3, 104 L.Ed.2d at 972, n. 3 (quoting *Ricks*, 449 U.S. at 258, 101 S.Ct. at 504)." 760 F. Supp. 909, 911, 912

2. RULE 4(j)

In declining to superimpose judicial rules upon Federal Rule of Civil Procedure 4, the unanimous opinion in *Omni Capital International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97 (1987) makes two poignant observations:

1. "We would consider it unwise for a court to make its own rule authorizing service of summons." 484 U.S. 97, 109

2. "Legislative rulemaking better ensures proper consideration of service rule's ramifications within the pre-existing structure and is more likely to lead to consistent application." 484 U.S. 97, 110 (footnote omitted)

Both the District Court and the Court of Appeals have done exactly what the Supreme Court said they should not do: allow Plaintiffs to bring Defendant before the federal court in plain violation of the 120-day limit for serving their Complaint.

The fact that neither the District Court nor the Court of Appeals attempts to reconcile their joint conclusion with the binding precedent in the Eleventh Circuit makes the result obviously arbitrary and worthy of correction by the Supreme Court:

1. *Schnabel v. Wells,* 922 F.2d 726 (11th Cir. 1991): Personal service is required, and actual notice does not cure defective service.

2. *Prisco v. Frank* 929 F.2d 603 (11th Cir. 1991): Good cause required by Rule 4(j) does not consist of negligence or inadvertence.

3. *In re Cooper,* 971 F.2d 640 (11th Cir. 1992): Rule 4(j) mandates dismissal for tardy service in the absence of good cause, and district courts have no discretion to salvage actions "in the interest of justice."

The Eleventh Circuit's failure to require service within 120 days of the filing of the Complaint creates a different procedural rule for Alabama, Florida, and Georgia, and plaintiffs in these states are allowed to hail defendants before federal courts without the benefit of the due process requirements of summons and service required in other circuits:

1. *Frasca v. United States,* 921 F.2d 450, 453 (2nd Cir. 1990) discussed the history and purpose of Rule 4(j) and then followed the Seventh Circuit by requiring dismissal: "Discussing the specific question presented, the United States Court of Appeals for the Seventh Circuit, in *Geiger v. Allen,* 850 F.2d 330 (7th Cir. 1988), has stated that 'dismissal is mandatory if a defendant is not served within 120 days, unless the plaintiff can show good cause for the delay.'"

2. *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81 (4) (3rd Cir. 1987), cert. den. 484 U.S. 965: "Misplaced reliance by plaintiff upon word of specially appointed process server that process had been served upon defendant within 120-day period did not establish good cause to excuse plaintiff's failure to make service until 55 days after time limit had expired; plaintiff and counsel were not in possession of adequate proof of service of process upon defendant at time 120-day period lapsed, and did not exercise alternative means to effect timely service."

3. *Traina v. United States*, 911 F.2d 1155 (2) (5th Cir. 1990): "Actions falling into category of inadvertence, mistake or ignorance of counsel are not excusable neglect and do not establish good cause for extending 120-day period for service."

4. *Friedman v. Estate of Presser*, 929 F.2d 1151, 1156 (6th Cir. 1991), in rejecting purported service of process by mail where a defendant has actual knowledge of the lawsuit but does not acknowledge service, requires dismissal of the action because personal service is not made within 120 days and offers the following observations on due process:

> "Due to the integral relationship between service of process and due process requirements, we find that the district court erred in its determination that actual knowledge of the action cured a technically defective service of process. *See Omni Capital Int'l v. Rudolf Wolff & Co., LTD.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987) ('[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the

defendant and the forum.'); *Amen v. City of Dearborn*, 532 F.2d 554, 557 (6th Cir. 1976) ('[D]ue process requires proper service of process in order to obtain in personam jurisdiction.'); *Delta S. S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir. 1985) (A defendant's return and acknowledgement are an essential part of the procedure for establishing in personam jurisdiction). In short, the requirement of proper service of process 'is not some mindless technicality.' *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987)."

5. *Tso v. Delaney*, 969 F.2d 373 (2) (4) (7th Cir. 1992) follows *Geiger v. Allen*, 850 F.2d 330 (7th Cir. 1988) and explains two items that do *not* constitute good cause:

   2. "Simple attorney neglect, without more, cannot serve as basis for finding of good cause for failure to make timely service of process."

   4. "Although prejudice to plaintiffs and lack of prejudice to defendants are relevant considerations in good cause determination, they cannot by themselves provide good cause for failure to make service within 120-day period."

6. *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992) illustrates how an in pauperis prisoner in Alaska has less access to the federal court system than the members of the Columbus Fire Department:

   "Federal Rule of Civil Procedure 4(j) required Hamilton to effect service of process within 120 days after filing the complaint. In

mandating service within 120 days, 'Congress balanced the possible loss of litigant's federal cause of action against the need to encourage diligent prosecution of lawsuits.' *Townsel v. County of Contra Costa*, 820 F.2d 319, 321 (9th Cir. 1987). Although there is a 'good cause' exception to Rule 4(j), it applies only in limited circumstances, and inadvertent error or ignorance of governing rules alone will not excuse a litigant's failure to effect timely service, *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

Nothing in the record persuades us that Hamilton had 'good cause' for failing to comply with the dictates of Rule 4(j). At the time the magistrate ordered service on only six of the defendants, Hamilton had an opportunity to object to the order and to request service for the rest. In addition, Hamilton could have served the other defendants by certified mail. He fails to show that he pursued any of these alternatives and there is no evidence that any of the remaining 12 defendants was ever served."

7. *Cox v. Sandia Corporation*, 941 F.2d 1124, 1126 (10th Cir. 1991) contains sound advice — which is apparently unnecessary in the Eleventh Circuit:

> "As one commentator has observed: 'The lesson to the federal plaintiff's lawyer is not to take any chances. Treat the 120 days with the respect reserved for a time bomb.' *Siegel, Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 109 (1983). It was not an abuse of discretion here to invoke this lesson."

The absence of any meaningful discussion in the opinion of the Court of Appeals concerning Rule 4(j) should not detract from the importance of this issue. Quite to the contrary, it accentuates one of the considerations governing review on writ of certiorari contained in Supreme Court Rule 10: "When a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

3. RULE 37(d)

Just as the Eleventh Circuit departs from the advice of the Supreme Court and from its own circuit precedent in failing to enforce Rule 4(j), so also does it fail to follow binding precedent by not imposing sanctions allowed by Rule 37(d). Perhaps thinking that no ruling on the City's Rule 37(d) Motion to Dismiss was necessary in view of the fact that summary judgment was granted, the District Court did not rule on this issue; however, the Court of Appeals, in Footnote 3, declines the City's invitation to sustain the entire summary judgment against all Plaintiffs on the alternate Rule 37(d) ground with the following statement that disposes of the Rule 4(j) motion and the Rule 37(d) motion in one fell swoop: "Having considered both of these contentions, we conclude that they are clearly without merit and do not warrant further discussion." So, the City's Petition for Certiorari goes to the Supreme Court without the benefit of any discernible discretion having been exercised by the District Court on Rule 37(d) and without any definable discretion having been exercised by the Court of Appeals.

Regardless of what thoughts underlie the conclusory footnote observation of the Eleventh Circuit, the decision departs from both *National Hockey League v. Metropolitan Hockey*

Club, Inc., 427 U.S. 639 (1976) and *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir. 1970). The syllabus of *National Hockey League* illustrates appropriate circumstances for the imposition of the extreme sanction of Rule 37 dismissal ("District Court did not abuse its discretion in resorting to the extreme sanction of dismissing respondents' antitrust action against petitioners pursuant to Fed. Rule Civ. Proc. 37, the court having found that, notwithstanding its admonitions and numerous extensions, respondents failed to respond to written interrogatories ordered by the court, and that under the circumstances such failure manifested 'flagrant bad faith' and 'callous disregard' by respondents' counsel of their responsibilities."), while page 643 of the opinion explains the reason for this holding ("But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."). The Fifth Circuit in Diaz had already reached a similar conclusion where a corporate officer failed to show up for a deposition:

> "The trial court granted default judgment as a sanction against Trefina pursuant to Rule 37(d), the pertinent parts of which read as follows:
>
> > If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, *** the court on motion or notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

> Professor Wright observes that '[w]ithout adequate sanctions, the procedure for discovery would be ineffectual. Under Rule 37 a party who seeks to evade or thwart a full and candid discovery incurs the risk of serious consequences. ***' C. Wright, Federal Courts § 90 (1963). While it is true that the courts should impose sanctions no more drastic than those actually required to protect the rights of other parties, the language of Rule 37(d) makes clear that the application of sanctions is entrusted to the discretion of the trial judge, and overleniency is to be avoided where it results in inadequate protection of discovery. *See* C. Wright, *supra*, at 346 & n. 14." 427 F.2d 1118, 1126

The City hastens to add that the current Rule 37(d) does not require wilful conduct by a party to impose the sanction of dismissal, nor does dismissal require any intervening action by an aggrieved party such as a motion to compel discovery. *Moore's Federal Practice,* Paragraph 37.05.

Without correction by the Supreme Court, the Eleventh Circuit's treatment of Rule 37(d) places parties in Alabama, Florida, and Georgia under different discovery obligations and privileges from those that exist in the following circuits:

1. *Al Barnett & Son, Inc. v. Outboard Marine Corp.,* 611 F.2d 32, 35, 36 (3rd Cir. 1979):

> "Appellants advance the argument that it was error for the trial court to penalize them with a Rule 37(d) dismissal without first ordering them to appear for their scheduled depositions. Rule 37 sanctions are contemplated when there has been virtually total noncompliance with discovery. *Notes of Advisory Committee on Rules,* Rule 37, 28 U.S.C.A. (1979 Supp.). Yet, a direct order by the Court, as Rule 37(a) and (b) requires, is not a necessary predicate to

imposing penalties under Rule 37(d). See *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 993 (8th Cir. 1975). When it has been determined that a party has wilfully failed to comply with the rules of discovery, it is within the discretion of the trial court to dismiss the action. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976); *G-K Properties v. Redevelopment Agency, Etc.*, 577 F.2d 645, 647 (9th Cir. 1978). Litigants may oppose discovery requests by seeking a protective order from the court, *Cine Forty-Second Street Theatre v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068-69 (2d Cir. 1979) (Oakes, J., concurring); they cannot be permitted to frustrate discovery by refusing to comply with a proper request. For courts to permit litigants to disregard the responsibilities that attend the conduct of litigation would be tantamount to 'encourag[ing] dilatory tactics.' *Id.* at 1068 (Kaufman, J.) The dismissal sanction, although severe, is a necessary tool, both to punish in the individual action and to deter future abuses of the discovery process. *National Hockey League v. Metropolitan Hockey Club, supra; Renfrew, Discovery Sanctions: A Judicial Perspective*, 67 *Calif.L.Rev.* 264 (1979). Moreover, with the increasedly complex and numerous cases that comprise the federal docket, courts can no longer indulge the 'deliberate tactical intransigence . . . responsible for the interminable delays and costs that plague . . . lawsuits' to the detriment of both opponent and nonopponent litigants. *Cine Forty Second Street Theatre v. Allied Artists*, 602 F.2d 1062, 1067 (2d Cir. 1979)."

2. *United States for use of Weston & Brooker Company v. Continental Casualty Company*, 303 F.2d 91, 92, 93 (4th Cir. 1962):

> "The sanctions authorized by Rule 37(d) should not be applied in the absence of wilful failure to comply with the provisions regarding discovery; however 'wilful failure' does not necessarily include a wrongful intent to disobey the rule. A conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance, is sufficient to invoke the penalty. *Brookdale Mill v. Rowley*, 218 F.2d 728 (6 Cir. 1954). We would have some hesitancy in supporting the judgment below in view of the fact that the interrogatories in question where in fact answered prior to judgment but for the fact that the record offers other support for the court's conclusion that defendant was but delaying the inevitable by its procrastination. The inconsistency between defendant's formal unsworn Answer and the sworn answers to interrogatories admitting its liability for almost half the amount sued for raises a permissible inference that the defendant was not energetically seeking to throw light on the facts at issue."

3. *Charter House Insurance Brokers, Ltd. v. New Hampshire Insurance Company*, 667 F.2d 600 (2) (7th Cir. 1981):

> "If a party or an officer, director or managing agent of a party, or person, designated to testify on behalf of party does not appear for properly noticed deposition, does not answer or object to interrogatories properly served, or does not make written response to proper request for

production or inspection, court may impose sanctions directly, without first issuing order to compel discovery."

4. *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 993 (8th Cir. 1975): "A direct order by the court as provided in Rule 37(a) and (b) is not a prerequisite to imposition of sanctions under Rule 37(d)."

5. *Sigliano v. Mendoza*, 642 F.2d 309 (5) (9th Cir. 1981): "Dismissal is a proper sanction for a serious or total failure to respond to discovery even without a prior order to compel discovery."

6. *Minnesota Mining & Manufacturing Company v. Eco Chem, Inc.*, 757 F.2d 1256 (1) (Fed. Cir. 1985): "Statement 'unable to respond,' filed in response to interrogatories in patent infringement suit, constituted a complete failure to serve answers to interrogatories, warranting entry of default judgment without first issuing an order compelling answer to interrogatories."

CONCLUSION

By relying on such cases as *Bazemore v. Friday*, 478 U.S. 385 (1986), the Court of Appeals understandably reached its erroneous conclusion. Footnote 5 of *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) makes the point which Petitioner submits constitutes one of the principal reasons for granting the Writ of Certiorari and reversing the Eleventh Circuit:

> "The dissent is mistaken to equate the application of a facially neutral but discriminatorily adopted system with the application of a system that is facially discriminatory. See *post*, at 916-917. With a facially neutral system the discriminatory act occurs *only*

> at the time of adoption, for each application is non-discriminatory (seniority accrues for men and women on an identical basis). But a facially discriminatory system (*e.g.*, one that assigns men twice the seniority that women receive for the same amount of time served) by definition discriminates each time it is applied. This is a material difference for purposes of the analysis we employed in *Evans* and *Ricks* — which focuses on the timing of the *discriminatory* acts for purposes of the statute of limitations. It is also why the dissent's citation, *post* at 915, of *Bazemore v. Friday*, 478 U.S. 385 (1986) in which '[e]ach week's paycheck . . . deliver[ed] less to a black than to a similarly situated white,' *id.*, at 395 — is misplaced."

The Court of Appeals also forgets the important policy that underlies statutes of limitations in general as was expressed in *Delaware State College v. Ricks*, 449 U.S. 250, 256, 257 (1980):

> "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-464 (1975); see *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)."

The Plaintiff in the Delaware State College case, like the Plaintiffs in the Columbus Fire Department, alleged only a single act of discrimination, and the FLSA statute of limitations should have run on the Columbus battalion chiefs, fire captains, and fire lieutenants just like the Title VII statute of limitations ran on Professor Ricks:

> "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged dis-

criminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such facts." 449 U.S. 250, 257 (footnote omitted)

Respectfully submitted this 10th day of August, 1994.

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APPENDIX

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 28 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-8580

PETER L. KNIGHT,
DENNIS L. WALL,
MICHAEL D. MULKEY, ET AL.
Plaintiffs-Appellants,
Cross-Appellees,

versus

COLUMBUS, GEORGIA,
Defendant-Appellee,
Cross-Appellant,

Appeal from the United States District Court for the Middle District of Georgia

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ORDER:

( ) The motion of Appellee, Columbus, GA., for (xx) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(x) The motion of Appellee, Columbus, GA., for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including August 15, 1994, the stay to continue in force until the final disposition of the case

by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * * * *

s/s Ed Carnes

UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 14 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8580

PETER L. KNIGHT, DENNIS L. WALL,
MICHAEL D. MULKEY, ET AL.
Plaintiffs-Appellants,
Cross-Appellees,

versus

COLUMBUS, GEORGIA,
Defendant-Appellee,
Cross-Appellant,

On Appeal from the United States District Court for the Middle District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Pro-

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*Hon. Robert R. Merhige, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

cedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

* * * * *

ENTERED FOR THE COURT:

s/s Ed Carnes

UNITED STATES CIRCUIT JUDGE

Peter L. KNIGHT, Dennis L. Wall,
Michael D. Mulkey, et al., Plaintiffs-Appellants,
Cross-Appellees,

v.

COLUMBUS, GEORGIA, Defendant-
Appellee, Cross-Appellant.

No. 93-8580

United States Court of Appeals,
Eleventh Circuit.

April 22, 1994

Officer and nonofficer employees of city fire department brought suit alleging violation of Fair Labor Standards Act (FLSA). The United States District Court for the Middle District of Georgia, No. CV-90-95-COL, J. Robert Elliott, J., held that claims were barred by statute of limitations and granted summary judgment for city. Appeal was taken. The Court of Appeals, Carnes, Circuit Judge, held that: (1) claims that officers were improperly classified as exempt executive or administrative employees accrued with each paycheck, but (2) claims by nonofficer firefighters that city violated FLSA by failing to accord them same raise granted to overtime-exempt city public safety employees was discrete act for which statute of limitations began running immediately.

Reversed in part, affirmed in part, and remanded.

Harlan S. Miller, Kirwan, Goger, Chesin and Parks, PC, Theresa L. Kitay, Allan L. Parks, Jr., Atlanta, GA, for appellants.

Eugene Hardwick Polleys, Jr., Columbus, GA, for appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and MERHIGE*, Senior District Judge.

CARNES, Circuit Judge:

I. INTRODUCTION

This case requires us to determine the applicability of the "continuing violation" doctrine to the statute of limitations under the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 *et seq.* The plaintiffs, former, present, and future officers and non-officer employees of the fire department of Columbus, Georgia ("the City"), filed this action on October 1, 1990. The officer plaintiffs allege that since the FLSA became applicable to local governments in 1985-86, the City has misclassified them as exempt executive or administrative employees and has failed to pay them overtime as required by section 7 of the FLSA. 29 U.S.C.A. § 207 (1965 & Supp.1993).

In contrast, the City has never denied that the non-officer plaintiffs are covered by the overtime provisions of the FLSA. The non-officers allege, however, that, on July 1, 1987, in order to evade the financial effects of the FLSA, and in violation of section 8 of the Fair Labor Standards Amendments of 1985, Pub.L. No. 99-150, § 8, 99 Stat. 787, 791 (1985), the City denied the non-officers a 7.5% pay increase granted to all City public safety employees not eligible for overtime.

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*Honorable Robert R. Merhige, Senior U.S. District Judge for the Eastern District of Virginia, sitting by designation.

The City moved for summary judgment on the merits and the district court denied the motion, finding "it to be clear that there exist disputed issues of material fact." The defendants renewed their motion for summary judgment on the merits, and also argued that the plaintiffs' claims were barred by the statute of limitations. Relying on our unpublished decision in *Dunn v. Cobb County,* 11th Cir. (No. 91-9086, Nov. 25, 1992), the district court held that both groups of plaintiffs' claims were barred by the statute of limitations, 29 U.S.C.A. §255(a) (1985), and entered summary judgment for the City. Both sets of plaintiffs appeal, arguing that their claims are timely under the "continuing violation" doctrine.

II. STANDARD OF REVIEW

(1) We exercise plenary review over the distict court's grant of summary judgment. *Chapman v. Klemick,* 3 F.3d 1508, 1509 (11th Cir.1993). In this case, the district court held that the plaintiffs' claims were barred by operation of the statute of limitations. In such circumstances:

> our review is . . . akin to the review of a dismissal for failure to state a cause of action or a judgment on the pleadings, because the dispute is whether there can be any right to assert the claim in the first instance. Given this posture, we must assume that the material allegations of the complaint are true and construe all inferences arising therefrom in [the plaintiffs'] favor.

Jones v. Resolution Trust Corp., 7 F.3d 1006, 1008 (11th Cir. 1993) (footnote omitted).

III. DISCUSSION

A. THE CONTINUING VIOLATION THEORY

[2] "The standard for determining whether an employment practice constitutes a continuing violation was set forth in *Gonzalez v. Firestone Tire & Rubber Co,* 610 F.2d 241 (5th Cir.1980)." *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir.1992). In *Gonzalez*, a suit brought under Title VII, we held that:

> A past act of discrimination for which a party did not file a charge of discrimination with the EEOC within the limitations period is legally equivalent to a dicriminatory act that occurred before the enactment of Title VII. Although such a past discriminatory act may continue to affect an employee's present pay and fringe benefits, such an effect does not constitute a continuing violation of Title VII. . . . [T]he critical question is whether any present violation exists. . . . [W]here the employer engaged in a discrete act of discrimination [outside the limitations period], allegations that the discriminatory act continues to adversely affect the employee or that the employer presently refuses to rectify its past violation will not satisfy the [statute of limitations].

Gonzalez, 610 F.2d at 249 (citations omitted). The critical distinction in the continuing violation analysis, therefore, is whether the plaintiffs complain of " 'the present consequence of a one time violation, which does not extend the limitations period, [or] the continuation of that violation into the present, which does.' " *Calloway v. Partners Nat'l Health Plans,* 986 F.2d 446, 448 (11th Cir.1993) (quoting *Beavers,* 975 F.2d at 796); *see also Ross v. Buckeye Cellulose Corp.*,

980 F.2d 648, 658 (11th Cir.1993).[1] Where a continuing violation is found, the plaintiffs can recover for any violations for which the statute of limitations has not expired. *Beavers*, 975 F.2d at 796.

B. THE OFFICER PLAINTIFFS' CLAIM

The FLSA exempts from its overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity. . . ." 29 U.S.C.A. § 213(a)(1) (1965 & Supp.1993); *see also* 29 C.F.R. §§ 541.1 to 541.3 (1993). The City argues that the officer plaintiffs, who hold the ranks of lieutenant, captain and battalion chief, are exempt executive or administrative employees and that, therefore, they are not entitled to overtime under the FLSA. The officer plaintiffs contend that they are not salaried employees, that their job functions place them beyond the scope of the executive and administrative exemptions, and that, therefore, they are entitled to overtime.

[3] The City argues that even if the officer plaintiffs are not exempt, their claim is untimely because the City adopted its classification system more than three years ago. Actions under the FLSA are "forever barred" unless "commenced within two years after the cause of action accrued." 29 U.S.C.A. § 255(a) (1985). In the case of willful violations, the limitations period is extended to three years. *Id.* According to the City, the adoption of its classification system constitutes a discrete past act which started the limmitations clock running; by failing to assert their rights within three years of the policy's adoption, the officer plaintifffs forever lost the right to challenge the system. We disagree.

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[1]Although the above cases all arose under Title VII, the rule they establish is equally applicable to FLSA cases. *Cf. Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir.1973) (borrowing the continuing violation theory from a FLSA case and applying it to a claim under the Equal Pay Act).

The City's argument fails because, if the officer plaintiffs are not subject to the exemption, the FLSA has been violated each time the City issued an officer plaintiff a paycheck that failed to include payment for overtime hours actually worked. Absent an applicable exemption, the FLSA requires the City to pay its firefighters overtime once they have worked more than 159 hours in any 21 day period. 29 C.F.R.§ 553.230(e) (1993). Each failure to pay overtime constitutes a *new* violation of the FLSA. *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1050 (5th Cir.1973). ("It is well settled that [a] separate cause of action for overtime compensation accrues at each regular payday immediately following the work period during which the services were rendered and for which the overtime compensation is claimed." (internal quotation marks omitted)); *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 271 (5th Cir.1987); *Beebe v. United States*, 226 Ct.Cl. 308, 640 F.2d 1283, 1293 (1981); *Aaron v. City of Wichita*, 797 F.Supp. 898, 902 (D.Kan.1992) ("[E]ach paycheck received by plaintiffs constituted a new cause of action for the alleged violation of the FLSA [and] plaintiffs are entitled to recover for any violations which occurred in the two years preceding [the date of their claim],"); *Mitchell v. Lancaster Milk Co.*, 185 F.Supp. 66, 70 (M.D.Pa.1960); *cf. Bazemore v. Friday*, 478 U.S. 385, 395, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986) ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . . ."); *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539, 548 (11th Cir.1991) (applying the continuing violation theory to actions under the Equal Pay Act and noting that the theory is "applicable to challenges under the [FLSA] for illegal minimum wages or overtime payments"); *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986) (applying the continuing violation theory to discriminatory wage payments under the Equal Pay Act); *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir.1980) (holding that Title VII and Equal Pay Act claims were

not barred by the statute of limitations because the alleged discrimination occurred each time the female plaintiff was paid less than her male colleagues for the same work).

Although the theory on which the officer plaintiffs rely is often called the "continuing violation theory," *see, e.g., Hendrix v. City of Yazoo City*, 911 F.2d 1102, 1103 (5th Cir. 1990), in the present case, the term is something of a misnomer. The term "continuing violation" suggests that the original violation, namely the decision to classify overtime-eligible employees as exempt, is somehow the source of the employees' present ability to recover. It is not. Assuming they are not exempt employees, the source of their recovery is the failure to pay them overtime, not the City's rationale for not paying them overtime. For statute of limitations purposes, the City's decision to classify the officer plaintiffs as exempt is not relevant — except, perhaps to the willfulness issue and whether the three-year or two-year period applies. What is determinative for statute of limitations purposes is that the officer plaintiffs have worked unpaid overtime hours during the statute of limitations window.

The term "continuing violation" also implies that there is but one incessant violation and that the plaintiffs should be able to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window. That is not the case. Instead of one on-going violation, this case involves a series of repeated violations of an identical nature. Because each violation gives rise to a new cause of action, each failure to pay overtime begins a new statute of limitations period as to that particular event.

Thus, the officer plaintiffs have a non-barred cause of action with respect to any claims (i.e., any paychecks which omitted pay for overtime worked) that accrued within two years-three years, if the City's violations were willful — of the date

the complaint was filed. *See* 29 U.S.C.A. § 255(a) (1985). If they are not exempt employees, then the officer plaintiffs are entitled to "recover for overtime hours worked dating back to the beginning of the statute of limitations period, even though [the original classification occurred] outside the statute of limitations." *Hendrix*, 911 F.2d at 1104 (discussing *Halferty v. Pulse Drug Co.*, 821 F.2d 261, 270-71 (5th Cir.1987)); *see also Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 796 (11th Cir.1992) (holding that if a continuing violation of Title VII exists then the plaintiff may recover "with respect to the application of that [unlawful] policy within the preceding 180 days," which is the Title VII statute of limitations period).

Two recent decisions from other circuits appear at first blush to be contrary to the decision we reach, but upon a closer look, are reconcilable with it. In *Anderson v. City of Bristol*, 6 F.3d 1168, 1176 (6th Cir.1993), the court held that the plaintiff firefighters' claim for overtime under section 7 was time-barred. However, the *Anderson* plaintiffs' sole complaint was that the city had recalculated their wage rates so as to eliminate the future impact of overtime pay. *Id.* at 1169. The wage recalculation had occurred five years before the plaintiffs filed suit, *id.*, and "[t]he only continuing effect [was] a reduced pay rate that absorbed any overtime increase that would have occurred without the wage reduction." *Id.* at 1176. Each actual paycheck included payment for overtime worked, but because the plaintiffs' base pay had been reduced, their take-home pay remained unchanged. The court reasoned that any unlawful action by the city occurred *outside* the statute of limitations. The *Anderson* decision is not inconsistent with our decision in this case, where the officer plaintiffs suffered a new violation with each paycheck they received.[2]

[2]The claims of the *Anderson* plaintiffs are indistinguishable, however, from those of the *non-officer* plaintiffs in this case, and as to them we reach the same result as the Sixth Circuit did in *Anderson*. See Part III.C.2, below.

In *Alldread v. City of Grenada*, 988 F.2d 1425, 1427 (5th Cir.1993), the plaintiffs, officers and non-officers of the Grenada fire department, alleged that the city had violated the FLSA by failing to pay them for "sleep time," and by misclassifying the officer plaintiffs as "exempt employees." The Fifth Circuit affirmed the district court's ruling that these claims were time-barred. *Id.* at 1430. The *Alldread* decision is inapposite with respect to the officer plaintiffs' claims in this case. In *Alldread*, "all [the] appellants alleged they were entitled to receive overtime compensation for their sleep time." 988 F.2d at 1429. Under the FLSA regulations, the city could, pursuant to " 'an expressed or implied agreement' " with the firefighters, *id.* at 1428 (quoting 29 C.F.R. § 553.222(c)), treat sleep time as non-compensable for firefighters working shifts of more than 24 hours. Each of the *Alldread* plaintiffs had signed an agreement providing that uninterrupted sleep time would not be compensated. More than four years after the new pay system had taken effect, the plaintiffs filed suit, claiming that the city had coerced them into signing the agreement.*Id.* at 1429. The Fifth Circuit held:

> The sole basis for appellants' seeking to impose liability against the City for sleep time compensation is their claim that the City, in the course of devising the new pay policy, coerced them, in August 1985, to relinquish their FLSA rights under threat of termination and thereafter, in October 1985, implemented a pay system predicated on those waivers. That alleged act of coercion is the event giving rise to appellants' complaint and is patently a single violation of the FLSA. Even though the *effect* of this act was reflected in appellants' subsequent paychecks, that effect does *not* transform the act into a continuing violation.

Id. at 1432 (emphasis in original). The claims of the officer plaintiffs in *Alldread* were based on a single violation of the FLSA which had occurred more than three years before. By contrast, the claims of the officer plaintiffs in the present case are not; they do not require reference to any action taken by the City outside the limitations period. It is true that the City's original adoption of the pay policy occurred more than three years ago, but the officer plaintiffs need not prove the adoption of that pay policy to recover. If they are truly not exempt employees, the officer plaintiffs only need to prove that they have worked unpaid overtime hours during the statute of limitations period.

Therefore, the district court's order granting the City summary judgment as to the officer plaintiffs' claims on statute of limitations grounds is due to be reversed insofar as it involves paychecks, received during the relevant statute of limitations period, which did not include payment for overtime that was worked.[3]

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[3]In its brief on appeal, the City argues that it is entitled to summary judgment on the merits of the officer plaintiffs' claims. Because the district court granted summary judgment only on statute of limitations grounds, we decline, for prudential reasons, to rule on the exemption issue in this appeal.

On cross-appeal, the City also argues that: (1) the district court erred by denying its motion to dismiss under Fed.R.Civ.P. 4(j) for failure to effect service within 120 days; and (2) that we should affirm the district court's grant of summary judgment because the district court should have dismissed the case under Fed.R.Civ.P. 37(d) because of the plaintiffs' failure to respond to the City's discovery requests. Having considered both of these contentions, we conclude that they are clearly without merit and do not warrant further dicussion.

C. THE NON-OFFICER PLAINTIFFS

1. Background

On February 19, 1985, the Supreme Court held that the overtime and minimum-wage provisions of the FLSA apply to state and municipal goverments. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554-57, 105 S.Ct. 1005, 1019-21, 83 L.Ed.2d 1016 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)). Realizing that immediate enforcement of the FLSA would impose severe financial hardships on state and local governments, Congress "deferred application of the FLSA overtime provisions" until April 15, 1986, "so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities." S.Rep. No. 99-159, 99th Cong., 1st Sess. 8, 15 (1985), *reprinted in* 1985 U.S.C.C.A.N. 651, 655-56, 663; *see* Fair Labor Standards Amendments of 1985 (1985 Amendments), Pub.L. No. 99-150, §7, 99 Stat. 787, 791 (1985. At the same time that Congress gave state and local governments a grace period to put their financial houses in order, it also prohibited them from "discriminat[ing] against an employee with respect to the employee's wages or other terms of employment because on or after February 19, 1985, the employee asserted coverage under section 7 of the [FLSA]." 1985 Amendments § 8, 99 Stat. at 791. After August 1, 1986, however, such protection is available "only for an employee who takes an action described in section 15(a)(3) of [the FLSA]." *Id.* (Section 15(a)(3) of the FLSA prohibits discrimination against an employee "because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding." 29 U.S.C.A. § 215(a)(3) (1965).)

We will assume, without deciding, that the City's July 1987 decision to deny a pay raise to the non-officer plaintiffs was a discriminatory act preceded by the requisite employee action under 29 U.S.C.A. § 215(a)(3) (1965). We conclude, nonetheless, that the district court correctly held that the non-officer plaintiffs' claims are time-barred.

2. Applicability of the Statute of Limitations

[4] Unlike the officer plaintiffs, the non-officers have not suffered from repeated violations of the FLSA. The non-officers allege that on July 1, 1987, the City violated section 8 of the 1985 Amendments by not according them the same raise granted to overtime-exempt City public safety employees. Section 8 clearly provides that "[t]he protection against discrimination afforded by [this section] shall be available after August 1, 1986, only for an employee who takes an action described in section 15(a)(3) of [the FLSA, 29 U.S.C.A. § 215(a)(3)]." 1985 Amendments § 8, 99 Stat. at 791. Section 15(a)(3) requires an intentional action by the employer in response to protected employee conduct. The non-officer plaintiffs' complaint alleges only one such act of intentional discrimination: the City's July 1987 decision to deny them a pay raise. For the non-officer plaintiffs to prevail, they must establish that the City violated the FLSA when it failed to give them a pay raise in July 1987, which was more than three years before the commencement of this action in October 1990. The problem for the non-officer plaintiffs is that the City's 1987 action, even if unlawful, is now insulated from legal attack by the statute of limitations. There is no allegation that the discriminatory nature of the City's action was not immediately apparent to the plaintiffs. We have no authority, be it statutory or precedential, to suspend the application of the statute of limitations to belated litigants under such circumstances.

The continuing violation theory is of no avail to the non-officer plaintiffs. We are not convinced that each successive paycheck which pays the non-officers at a lower rate than overtime-exempt public safety employees constitutes a new act of wage discrimination as opposed to merely the lingering effect of a past unlawful act. The non-officers do not allege that any new discrimination inherent in their paychecks is intentional and in retaliation for employee action protected by section 15(a)(3). Thus, unlike the officer plaintiffs, whose claims do not involve an intent element, the non-officers are not the victims of repeated FLSA violations wich give rise to new statute of limitations periods.

The non-officer plaintiffs cite only two district court cases for the proposition that, until corrected, wage discrimination is a continuing violation. *See Hill v. City of Greensville,* 696 F.Supp. 1123, 1125-26 (N.D.Tex.1988); *Alexander v. City of Plainview,* 694 F.Supp. 221, 223 (N.D.Tex.1988). Neither case concerned application of the statute of limitations. Much more on point are *Alldread v. City of Grenada,* 988 F.2d 1425, 1429-31 (5th Cir.1993), and *Hendrix v. City of Yazoo City,* 911 F.2d 1102 (5th Cir.1990), both of which are statute of limitations cases.

In *Hendrix* the plaintiffs, municipal firefighters, claimed that the city had violated the anti-discrimination provision by reducing their base salaries in the wake of *Garcia* and the 1985 Amendments. *Hendrix,* 911 F.2d at 1103. However, the plaintiffs did not file their suit until more than three years after the pay reduction. The *Hendrix* court, reasoning by analogy. noted that in *Lorance v. AT&T Technologies,* 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989), the Supreme Court had "held that the discriminatory adoption of a facially neutral seniority system was a single violation [of Title VII] triggering the statute of limitations, rather than a continuing violation

renewed with each paycheck." *Hendrix*, 911 F.2d at 1104. Relying on *Lorrance*, the *Hendrix* court concluded that the central issue is "whether the practice at issue is part of, or a repetition of, a past discriminatory act, in which case there is a continuing violation, or whether it is facially neutral, simply giving effect to prior discrimination, in which case there is no continuing violation. *Id.*[4] In *Hendrix*, "[t]he reduction in pay was itself the violation; subsequent pay packets simply gave it continuing effect in a facially neutral manner." *Id.* at 1105. The Fifth Circuit adhered to this view in *Alldread*, 988 F.2d at 1432, and held that the alleged coercion of the plaintiffs into waiving compensation for sleep time was "patently a single violation of the FLSA," whose on-going "effect does not transform the act into a continuing violation."

The Sixth Circuit reached a similar result in *Anderson v. City of Bristol*, 6 F.3d 1168, 1174-76 (6th Cir.1993). The *Anderson* plaintiffs alleged that Bristol had reduced their base wage rates so as to eliminate the benefits of overtime eligibility under the FLSA. The plaintiffs did not challenge the recalculation until more than five years later. The *Anderson* court rejected the plaintiffs' section 8 discrimination claim as stale, holding that the recalculation was a discrete past act whose "only continuing effect [was] a reduced pay rate." *Id.* at 1176.

[5] With respect to the claims of the non-officer plaintiffs, the Fifth Circuit's holdings in *Hendrix* and *Alldread*, and the Sixth Circuit's decision in *Anderson*, are in line with our unpublished opinion in *Dunn v. Cobb County*, 11th Cir. (No.

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[4]Although the *Lorance* decision has been abrogated by statute in the Title VII-seniority system context, *see* 42 U.S.C.A. §2000e-5(e)(2) (Supp. 1993), we have previously described *Lorance* as " 'merely an application of the traditional distinction' between a continuing violation and the present consequences of a one-time past act of discrimination." *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 659 n.18 (11th Cir.1993) (quoting *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 799 (11th Cir. 1993)).

91-9086, Nov. 25, 1992). The parties to this case agree that the facts in *Dunn* were analogous to those presented by the claims of the non-officer plaintiffs here. In *Dunn* we affirmed the district court's judgment for the county on statute of limitations grounds, reasoning:

> The act challenged in this case is outside the limitations period and is barred by the statute of limitations. A discrete past act, such as that at issue here, cannot be considered a continuing violation under any reasonable interpretation of the continuing violation theory.

Under the Eleventh Circuit Rules, an unpublished opinion such as *Dunn* does not bind us. Rule 36-2. However, having considered the holding in *Dunn*, as well as the reasoning and similar results of *Hendrix*, *Alldread*, and *Anderson*, we are convinced that *Dunn* arrived at the proper rule, which we now adopt as Circuit precedent. When, as here, a claim of discrimination in violation of seciton 8 of the 1985 Amendments is premised on a discrete act, such as a one-time wage reduction, the statute of limittions begins to run from the time of the act. The receipt of subsequent paychecks, albeit diminished on account of the prior unlawful act, does not start a new statute of limitations period. Therefore, the district court correctly granted summary judgment against the non-officer plaintiffs.

IV. CONCLUSION

The district court's grant of sumary judgment for the City on statute of limitations grounds is REVERSED with respect to the claims of the officer plaintiffs and AFFIRMED with respect to the claims of the non-officer plaintiffs. The case is REMANDED for further proceedings consistent with this opinion.

Filed at 2:45PM
MAR 26 1993
Carolyn Fryer
DEPUTY CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT
OF GEORGIA

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

CIVIL ACTION NO. 90-95-COL

PETER L. KNIGHT; DENNIS L. WALL;
MICHAEL D. MULKEY; JACK D. KINSMAN;
JOHN HAYGOOD; HENRY HALL;
JAMES BULLOCK; WILLIAM L. McCARTY;
FRANK PETTY; and JIMMY L. HART,

Plaintiffs

vs.

COLUMBUS, GEORGIA,

Defendant

MEMORANDUM AND ORDER ON DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT

In the case above identified the Defendant has heretofore filed a motion for summary judgment and, after applying what then appeared to be the law of this circuit, this Court denied the motion. At that time the Court of Appeals for the Eleventh Circuit had not ruled on the appeal involving the case of *Dunn v. Cobb County*, 760 Fed. Sup. 909 (N.D. of Ga. 1991) which was on appeal. On November 25, 1992, in an unpublished opinion, the Court of Appeals affirmed the judgment of the District Court in the Cobb County case. *Dunn, et al. v. Cobb County, et al.*, Court of Appeals No. 91-9086.

In this case the Columbus Plaintiffs, like the Cobb County Plaintiffs, claim discrimination under Section 8 of the Fair Labor Standards Act and in this case, like the Cobb County case, the Defendant invokes the statute of limitations. Judge Evans of the Northern District held that the issuance of paychecks calculated on a pay base allegedly reduced in violation of the Fair Labor Standards Act did not constitute a "continuing violation" for statute of limitations purposes and that the claims were therefore barred by the three year statute of limitations, just as has been contended by the Defendant in this case, and the Court of Appeals in affirming the judgment of the District Court stated:

> After careful review and after oral argument, we conclude that the judgment of the district court is due to be affirmed. The act challenged in this case is outside the limitations period and is barred by the statute of limitations. A discrete past act, such as that at issue here, cannot be considered a continuing violation under any reasonable interpretation of the continuing violation theory.

Thus, in light of this most recent decision of the Court of Appeals, which addresses directly the issue here presented by the Defendant's renewed motion for summary judgment, this Court now sustains the Defendant's renewed motion and judgment will be entered accordingly.

IT IS SO ORDERED, this 26th day of March, 1993.

s/s J Robert Elliott

UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET
March 26, 19 93
Gregory J. Leonard, Clerk
by Carolyn H. Fryer
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

Filed at 3:30PM
MAY 10 1991
C.V. PALMER
DEPUTY CLERK
U.S. DISTRICT COURT
MIDDLE DISTRICT
OF GEORGIA

CIVIL ACTION NO. 90-95-COL

PETER L. KNIGHT, et al.,

Plaintiffs

vs.

COLUMBUS, GEORGIA, et al.,

Defendants

ORDER ON DEFENDANTS' MOTION TO DISMISS

In the case above identified the Defendants have filed a motion to dismiss the Plaintiffs' complaint on the ground that service was not perfected within 120 days following the date of the filing of the Plaintiffs' complaint. Upon a review of this matter the Court concludes that if, in fact, service was not perfected within 120 days the Plaintiffs have nevertheless shown good cause why the technical requirements were not satisfied within that period. The Defendants had ample notice of this lawsuit well within the period and have not been prejudiced by any lack of service within the 120 day period. Accordingly, the Defendants' motion to dismiss is denied.

IT IS SO ORDERED, this 10th day of May, 1991.

s/s J ROBERT ELLIOTT

UNITED STATES DISTRICT JUDGE